

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

DONNA CURLING, et al;)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION
)	FILE NO: 1:17cv02989-AT
BRIAN P. KEMP, et al.;)	
)	
)	
<u>Defendants</u>)	

**DEFENDANT MARK WINGATE'S
MOTION TO REMAND**

Defendant Mark Wingate, pursuant to 28 U.S.C.A. §§ 1447(c) and 1448, moves for a remand of this action to the Superior Court of Fulton County. The current action was removed by other prior-served defendants prior to service of the Verified Complaint for Declaratory Relief, Injunctive Relief, and Writ of Mandamus upon Defendant Mark Wingate. Defendant Wingate does not consent to the removal of this action. Thus, this action must be remanded to Fulton County Superior Court. Defendant Wingate shows this honorable court the following:

1.

On July 3, 2017, Plaintiffs Donna Curling, Coalition for Good Governance, Donna Price, Jeffrey Schoenberg, Laura Digges, William Digges III, and Ricardo Davis filed their Verified Complaint for Declaratory Relief, Injunctive Relief and Writ of Mandamus in the Superior Court of Fulton County against Defendants Brian P. Kemp, David J. Worley, Rebecca N. Sullivan, Ralph F. Simpson, Seth Harp, the State Election Board, Merle King, and the Center for Election Systems at Kennesaw State University, Richard Barron, Mary Carole Cooney, Vernetta Nuriddin, David J. Burge, Stan Matarazzo, Aaron Johnson, the Fulton County Board of Registration and Elections, Maxine Daniels, Michael P. Coveny, Anthony Lewis, Leona Perry, Samuel E. Tillman, Baoky N. Vu, the DeKalb County Board of Registrations and Elections, Janine Eveler, Phil Daniell, Fred Aiken, Joe Pettit, Jessica Brooks, Darryl O. Wilson, and the Cobb County Board of Elections and Registration.

2.

On August 4, 2017, Plaintiffs filed a Motion for Leave to File Amended Complaint in Fulton County Superior Court. On August 15, 2017, Plaintiffs filed a Memorandum in Support of Motion for Leave to File Amended Complaint

Pending in Removed State Court Action, in the United States District Court. The Amended Complaint included, among other things, adding as a defendant Mark Wingate, a member of the Fulton County Board of Registrations and Elections.

3.

Defendant Brian Kemp, Georgia Secretary of State and chair of the State Election Board, was served on August 3, 2017. Kemp removed this action to this Court on August 8, 2017.

4.

Defendant Ralph Simpson, member of the State Election Board, was served on July 13, 2017. Simpson removed this action to this Court on August 8, 2017.

5.

Defendant Seth Harp was served on July 14, 2017. Harp removed this action to this Court on August 8, 2017.

6.

Defendant Rebecca Sullivan, member of the State Election Board, was served on July 26, 2017. Sullivan removed this action to this Court on August 8, 2017.

7.

Defendant David Worley, a member of the State Election Board, had not been served at the time this matter was removed but Worley consented to removal of this action to this Court.

8.

Defendant State Election Board was served on August 3, 2017 by service on its chairperson. The State Election Board removed this action to this Court.

9.

Defendant Merle King, Executive Director of the Center for Election Systems at Kennesaw State University, had not been served at the time this matter was removed but King consented to removal of this action to this Court.

10.

Defendant Center for Election Systems at Kennesaw State University had not been served at the time this matter was removed but consented to removal of this action to this Court.

11.

Defendant Maxine Daniels, Director of Voter Registrations and Elections for DeKalb County, was served on Aug. 3, 2017. Daniels consented to removal of this action to this Court.

12.

Defendant Michael P. Coveny, member of the DeKalb County Board of Registrations and Elections, was served on July 30, 2017. Coveny consented to removal of this action to this Court.

13.

Defendant Anthony Lewis, member of the DeKalb County Board of Registrations and Elections, was served on July 30, 2017. Lewis consented to removal of this action to this Court.

14.

Defendant Leona Perry, member of the DeKalb County Board of Registrations and Elections, was served on July 28, 2017. Perry consented to removal of this action to this Court.

15.

Defendant Samuel E. Tillman, member of the DeKalb County Board of Registrations and Elections, was served on Aug. 1, 2017. Tillman consented to removal of this action to this Court.

16.

Defendant Baoky N. Vu, member of the DeKalb County Board of Registrations and Elections, was served on Aug. 1, 2017. Vu consented to removal of this action to this Court.

17.

Defendant DeKalb County Board of Registrations and Elections was served on Aug. 3, 2017. DeKalb County BRE consented to removal of this action to this Court.

18.

Defendant Richard Barron, Director of Fulton County Board of Registration and Elections, was served on July 30, 2017. Barron consented to removal of this action to this Court.

19.

Defendant Mary Carole Cooney, Chair of the Fulton County Board of Registration and Elections, was served on August 5, 2017. Cooney consented to removal of this action to this Court.

20.

Defendant Vernetta Nuriddin, member of the Fulton County Board of Registration and Elections, was served on July 30, 2017. Nuriddin consented to removal of this action to this Court.

21.

Defendant David J. Burge, member of the Fulton County Board of Registration and Elections, was served on August 1, 2017. Burge consented to removal of this action to this Court.

22.

Defendant Aaron Johnson, member of the Fulton County Board of Registration and Elections, was served on July 28, 2017. Johnson consented to removal of this action to this Court.

23.

Defendant Stan Matarazzo, a *former* member of the Fulton County Board of Registration and Elections, was served on July 30, 2017. Matarazzo consented to removal of this action to the United States District Court for the Northern District of Georgia.

24.

Mark Wingate, Matarazzo's replacement on the Fulton County BRE had not been served at the time of the filing of the removal and did not consent to the removal.

25.

Defendant Fulton County Board of Registration and Elections was served on August 7, 2017. Fulton County BRE consented to removal of this action to this Court.

26.

Defendant Janine Eveler, Director of Cobb County Board of Elections and Registration, had not been served at the time of the removal. Defendant Wingate is not aware of any written consent to removal from Eveler.

27.

Defendant Phil Daniell, member of the Cobb County Board of Elections and Registration, was served on August 4, 2017. Daniell consented to removal of this action to this Court.

28.

Defendant Fred Aiken, member of the Cobb County Board of Elections and Registration, was served on August 4, 2017. Aiken consented to removal of this action to this Court.

29.

Defendant Joe Pettit, member of the Cobb County Board of Elections and Registration, was served on August 7, 2017. Pettit consented to removal of this action to this Court.

30.

At the time of the removal, Defendant Jessica Brooks, member of the Cobb County Board of Elections and Registration had not been served. Defendant Wingate is not aware of any written consent to removal from Brooks.

31.

At the time of the removal, Defendant Darryl O. Wilson, member of the Cobb County Board of Elections and Registration, had not been served. Defendant Wingate is not aware of any written consent to removal from Wilson.

32.

Defendant Cobb County Board of Elections and Registration has not been served. Defendant Wingate is not aware of any written consent to removal from this defendant.

33.

At the time of removal on August 8, 2017, Defendant Mark Wingate, member of the Fulton County Board of Registration and Elections, had not been served.

34.

On August 21, 2017, Defendant Mark Wingate accepted service of the Summons and Verified Complaint for Declaratory Relief, Injunctive Relief, and Writ of Mandamus.

35.

This Motion for Remand is filed within thirty (30) days from the date of the August 8, 2017 removal as required by 28 U.S.C.A. § 1447 (c).

36.

Removal of a case to federal court requires the unanimous consent of all defendants. 28 U.S.C.A. §1446(b)(2)(A). The unanimity requirement mandates that in cases involving multiple defendants, all defendants must consent to removal. The Eleventh Circuit has held that a remand based solely on the unanimity requirement “is clearly based on a defect in the removal process.” In re Bethesda Mem'l Hosp. Inc., 123 F.3d 1407, 1410 & n. 2 (11th Cir.1997). As stated in Russell Corp. v. Am. Home Assur. Co., 264 F.3d 1040, 1044 (11th Cir. 2001), “the general rule is that if a case is remanded for failure to comply with the

unanimity requirement, the remand is based on the second ground set forth in § 1447(c)”.

37.

A party who is not served with summons and complaint until after the case is removed to federal court by other defendants has an unqualified right to move to remand if he does not agree to the removal. 28 U.S.C.A. §1448; Getty Oil Corp v. Insurance Co. of North America, 841 F.2d 1254, 1263 (5th Cir. 1988)(“if a removal petition is filed by a served defendant and another defendant is served after the case is thus removed, the latter defendant may still either accept the removal or exercise its right to choose the state forum by making a motion to remand”); Cohen v. Hoard, 696 F. Supp. 564 (D. Kan. 1988)(“a later served defendant has the right to choose the state forum by moving for remand. 28 U.S.C.A. §1448”).

38.

Defendant Wingate does not consent to the removal of this action to this Court and therefore requests that this Court remand this action to the Superior Court of Fulton County.

39.

The Plaintiffs are scheduled to file an amended Complaint on September 15,

2017. Since there is currently no operative complaint, no prejudice will befall any party as a result of this remand.

CONCLUSION

Defendant Mark Wingate respectfully requests that this Court remand this action to the Superior Court of Fulton County.

Respectfully submitted this 7th day of September, 2017.

OFFICE OF THE COUNTY ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **DEFENDANT MARK WINGATE'S MOTION TO REMAND** was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

This 7th day of September, 2017.

/s/David R. Lowman

Georgia Bar Number: 460298

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **DEFENDANT MARK WINGATE’S MOTION TO REMAND** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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I further certify that I have served, by electronic mail, the following non-cm/ecf participants:

Rep. Karen Handel
U.S. Congressional District 6
c/o Anne Lewis, Esq. awl@sbllaw.net

This 7th day of September, 2017.

/s/ David R. Lowman
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